

आयकर अपीलिय अधिकरण, हैदराबाद पीठ
IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'B' Bench, Hyderabad

Before Shri Manjunatha, G. Accountant Member and
Shri K. Narasimha Chary, Judicial Member

आ.अपी.सं / **ITA No.585/Hyd/2023 and**
SA No.10/Hyd/2024
(Arising out of ITA No.585/Hyd/2023)
(निर्धारण वर्ष / Assessment Year: 2014-15)

Shri Krishna Murthy Ella Hyderabad PAN:AACPE6389G (Appellant)	Vs.	Dy. C. I. T. Circle 1(2) Hyderabad (Respondent)
निर्धारिती द्वारा / Assessee by: Shri P Murali Mohan Rao, CA		
राजस्व द्वारा / Revenue by: Smt. Sheetal Sarin, DR		
सुनवाई की तारीख / Date of hearing: 18/07/2024		
घोषणा की तारीख / Pronouncement: 14/08/2024		

आदेश/ORDER

Per Manjunatha, G. A.M

This appeal and Stay Application filed by the assessee are directed against the order dated 11/10/2023 of the learned CIT (A)-NFAC Delhi, relating to A.Y.2014-15.

2. The assessee has raised the following grounds:

S.No	Grounds of Appeal	Tax effect
1	The Ld. CIT(A) is erroneous both on facts and in law to the extent the order is prejudicial to the interest of the appellant	General ground
2	The Ld.CIT(A) erred in not considering the fact that the AO ought to have appreciated the fact that reasons recorded u/s 148(2) of the Act were not in accordance with the provisions of sections 147, 148 and 151 of the Act because the AO has not identified new tangible material to show that income has escaped assessment.	Technical ground
3	The Ld.CIT(A) ought to have appreciated the fact that the AO has reopened the assessment made u/s 147 which is purely based upon borrowed satisfaction without performing any necessary enquiries or inspection which is against the provisions of the IT Act.	As stated above
4	The Ld.CIT(A) erred in not considering the fact that the AO has passed the order without actually considering the facts of the case and submissions made by the assessee which is against the provisions of law and principles of natural justice.	As stated above
5	The Ld.CIT(A) ought to have appreciated the fact that the AO without forming any opinion/ belief of his own and without gathering any material or enquiry-initiated proceedings for reopening u/s 147 of the Act is incorrect and reopening assessment merely on borrowed information is against to the Act and provisions of the Act.	As stated above
6	The Ld.CIT(A) erred in not considering the fact that the AO has reopened the assessment u/s 147 basing on a hunch that the assessee's income has escaped assessment without recording any satisfaction to corroborate such hunch.	As stated above

7	The Ld. CIT(A) erred in not considering the fact the AO has to draw conclusions on the basis of certain admitted facts and material on record and not on the basis of presumptions as it against the principles of natural justice.	Merit ground
8	The Ld. CIT(A) erred in not considering the fact the AO done no independent application of mind to the tangible material which forms the basis of the reasons to believe that income has escaped assessment.	As stated above
9	The Ld.CIT(A) ought to have appreciated the fact that the AO erred in not considering that the share purchase agreement dated 30.09.2005 made between Mr. Krishna Murthy Ella and M/s. Mindtree Trading Private Limited is a conditional agreement.	As stated above
10	The Ld.CIT(A) ought to have appreciated the fact that the AO erred in completing the assessment u/s 143(3) r.w.s 147 of the Act by making an addition u/s 56(2)(vii)(c) of Rs.2,75,37,750/- without appreciating the facts of the case.	Rs.1,60,61,920/-
11	The Ld.CIT(A) ought to have appreciated that transfer of 2,22,222 shares of Bharat Biotech International Limited held by M/s. Mind Tree Trading Company Limited to Mr. Krishna Murthy Ella is obligatory and originated from original share purchase agreement dated 30.09.2005.	Merit ground
12	The Ld.CIT(A) ought to have appreciated that the assessee has bought 2,22,222 shares at price of Rs.1/- and has forgone the right to acquire other 18 lakh shares whose market value is far more than they were sold in at the first instance.	As stated above
13	The Ld.CIT(A) ought to have appreciated the fact that the AO erred in mentioning fair market value as Rs.124.92 is not correct as the company Bharat Biotech International Limited is an unlisted company and the shares are restricted shares. Hence fair market value is not applicable.	As stated above

14	The Ld.CIT(A) ought to have appreciated the fact that the assessee has sold the shares, and as already paid the capital gain in the AY 2006-07.	As stated above
15	The assessee may add, alter, or modify or substitute any other points to the grounds of appeal at any time before or at the time of hearing of the appeal.	General ground.

3. The brief facts of the case are that the assessee is an individual and chairman & M.D of M/s. Bharat Biotech International Ltd. The assessee has filed its return of income for the A.Y 2014-15 on 31.07.2014 admitting total income of Rs.1,62,27,830/-. The assessment has been subsequently reopened u/s 147 of the I.T. Act, 1961, for the reasons recorded as per which, income chargeable to tax has been escaped the assessment. According to the Assessing Officer, as per the information available with the Department, M/s. Mind Tree Trading Company Ltd has sold its investment in shares of M/s. Bharat Biotech International Ltd @ Rs.1 per share to Mr. Krishna Murthy Ella during the financial year 2013-14 relevant to A.Y 2014-15. The Assessing Officer further noted that as per the financial statement of M/s. Bharat Biotech International Ltd for the year ending 31.3.2014, the number of shares held by Shri Krishna Murthy Ella increased from 41,77,560 to 45,95,095. On verification, it is noticed that the assessee has purchased 4,17,535 shares from M/s. Mind Tree Trading Co. Pvt Ltd @ Rs.1 per share, whereas the book value or fair market value was at Rs.124.92 per share. Since the appellant has received shares for a

consideration which is less than the fair market value/book value, the same needs to be treated as income in terms of section 56(2)(vii)(c) of the I.T. Act, 1961. Therefore, opined that the income chargeable to tax had been escaped the assessment to the tune of Rs.5,17,40,937/- and thus, issued notice u/s 148 of the I.T. Act, 1961 on 12.3.2019 and served on the assessee. In response, the assessee filed return of income on 27.04.2019 admitting total income of Rs.1,62,27,830/-.

4. During the course of assesment proceedings, the assessee requested for copies of reasons recorded for re-opening of the assessment and the same was provided to the assessee. The Assessing Officer called upon the assessee to explain as to why the provisions of section 56(2)(vii)(c) of the I.T. Act, 1961 should not be invoked to assess the difference between book value/fair value of the shares as on the date of purchase and consideration paid for purchase of shares as income of the assessee. In response, the assessee submitted that he had entered into a share purchase agreement with M/s. Mind Tree Trading Company Ltd and has transferred 20,00,000 shares @ Rs.110/- per share. The agreement has been subsequently cancelled on 29.04.2013. The reasons for cancellation of the agreement was that at the time of sale of shares, certain terms & conditions were attached to it, but because of non-fulfilment of certain terms and conditions, both parties agreed to cancel the agreement and returned 2,22,222 shares held by M/s. Mind Tree Trading Company Ltd. Therefore, submitted that since it is a case

of cancellation of share purchase agreement, the provisions of section 56(2)(vii)(c) cannot be invoked. The Assessing Officer after considering the relevant submission of the assessee and also taken note of certain facts opined that as per provisions of section 56(2)(vii)(c), if any assessee receives any property, other than immovable property for a consideration which is less than the aggregate fair market value of the property by an amount exceeding Rs.50,000/-, the aggregate fair market value of such property has exceeded such consideration should be treated as income of the assessee. Since the appellant has received 2,22,222 equity shares @ Rs.1/- per share and the market/book value of the shares at the time was at Rs.124.92, the differential amount of Rs.123.92 per share is a benefit derived by the assessee without any consideration which needs to be assessed under the provisions of section 56(2)(vii)(c) of the I.T. Act, 1961. Therefore, opined that the argument of the assessee is that it is not a case of purchase but cancellation of share purchase agreement and return the shares to the original shareholders is not correct and thus, made addition of Rs.2,75,37,750/- u/s 56(2)(vii)(c) of the I.T. Act, 1961.

5. Being aggrieved by the assessment order, the assessee preferred an appeal before the learned CIT (A). Before the learned CIT (A), the assessee challenged the reopening of the assessment on the ground that the assessment has been reopened on the basis of borrowed satisfaction without there being any independent application of mind by the Assessing Officer which is

evident from the reasons recorded for reopening of the assessment, where the Assessing Officer has formed reasonable belief of escapement of income on the ground that the appellant has purchased 4,17,535 shares, whereas while concluding the assessment, the Assessing Officer has observed that the appellant has purchased 2,22,222 shares. Therefore, submitted that the reopening of the assessment is bad in law and liable to be quashed. The assessee also challenged the addition made by the Assessing Officer towards consideration received for purchase of shares u/s 56(2)(vii)(c) on the ground that it is not a case of purchase of shares for consideration which is less than the fair market value of the shares as on the date of said purchase, but it is a case of cancellation of share purchase agreement and retention of shares. Therefore, provisions of section 56(2)(vii)(c) cannot be invoked.

6. The learned CIT (A) after considering the relevant submission of the assessee and also taken note of certain judicial precedents rejected the legal ground taken by the assessee challenging the validity of reopening of the assessment on the ground that, where the Assessing Officer had applied his own mind and unless the entire material coming before him to come to his prima facie reason to believe, then reasons recorded by the Assessing Officer is valid. Further, at the time of examining the validity of reopening of the assessment what is required to be tested is the reasons recorded by the Assessing Officer which is the foundation for acquiring the jurisdiction, but not the

escapement of income. Therefore, rejected the grounds taken by the assessee on reopening of the assessment. As regards the addition made by the Assessing Officer towards the consideration received in the form of benefit accruing to the appellant for acquiring 2,22,222 shares, the learned CIT (A) by following the decision of the ITAT Ahmedabad Bench in the case of Jigar Jaswant Shah vs. ACIT reported in 142 taxmann.com 200 held that the appellant had acquired 2,22,222 shares @ Rs.1/- per share, whereas the market value of the share was at Rs.124,92 per share. The appellant had not been able to justify the price of acquisition of shares at Rs.1 per share when the market price was Rs.124,92 per share. Although the appellant claims to have acquired the shares on cancellation of share purchase agreement, but said agreement does not entitle the appellant to acquire the shares for a price which is less than the fair market value/book value of the shares. Therefore, opined that the Assessing Officer is right in assessing the differential amount of Rs.2,75,37,750/- as income of the assessee u/s 56(2)(vii)(c) of the I.T. Act, 1961.

7. Aggrieved by the order of the learned CIT (A), the assessee is in appeal before the Tribunal.

8. The learned Counsel for the assessee submitted that the learned CIT (A) is erred in upholding the reopening of the assessment without appreciating the fact that the Assessing Officer has reopened the assessment purely based upon the borrowed satisfaction without performing necessary inquiries or

inspection before forming reasonable belief of escapement of income. The learned Counsel for the assessee referring to the reasons recorded for reopening of the assessment and the assessment order passed by the Assessing Officer making addition u/s 56(2)(vii)(c) of the Act submitted that, the Assessing Officer have referred to the financial statement of M/s. Bharat Biotech International Ltd and presumed that the appellant has purchased 4,17,535 shares from Mindtree Trading Co. Ltd @ Rs.1/- per shares whereas the fact remains that the appellant had received back 2,22,222 shares on cancellation of share purchase agreement dated 30.09.2005 vide cancellation agreement dated 29.4.2013. The Assessing Officer has not verified or carried out any investigation but borrowed the satisfaction of the Assessing Officer who completed the assessment of M/s Bharat Biotech International Ltd and simply issued notice u/s 148 of the I.T. Act, 1961. Therefore, he submitted that there is no live nexus between formation of belief of escapement of income and material considered by the Assessing Officer and thus in absence of satisfaction, the reopening of the assessment on the basis of borrowed satisfaction is invalid and liable to be quashed. In this regard, he relied upon the following judicial precedents:

- 1) Hon'ble Guwahati High Court in the case of JCIT vs George Williamson (Assam) Ltd
- 2) Hon'ble Supreme Court in the case of PCIT vs Manzil Dinesh Kumar
- 3) ITAT Hyderabad in the case of Shah Gayatri Sugars Ltd vs ACIT

- 4) Hon'ble Bombay High Court in the case of PCIT vs Shodiman Investments (P.) Ltd
- 5) Hon'ble Delhi High Court in the case of PCIT vs Meenakshi Overseas (P.) Ltd
- 6) Hon'ble Delhi High Court in the case of PCIT vs G&G Pharma India Ltd
- 7) Hon'ble Supreme Court in the case of CIT vs Kelvinator of India Ltd
- 8) ITAT Hyderabad Bench in the case of S. Ranjith Reddy vs DCIT
- 9) Hon'ble Supreme Court in the case of Indian Oil Corporation vs ITO
- 10) ITAT Mumbai in the case of Income Tax Officer vs. Everlon Synthetics Pvt. Ltd
- 11) Hon'ble Gujarat High Court in the case of Sayaji Industries Ltd vs. JCIT
- 12) Hon'ble Supreme Court in the case of Income Tax Officer vs. Lakhmani Mewal Das

9. The learned Counsel for the assessee further referring to the addition made u/s 56(2)(vii)(c) of the Act, submitted that the Assessing Officer and the learned CIT (A) is totally erred in coming to the conclusion that the assessee has purchased 2,22,222 shares and derived benefit @ Rs.123.92 per share without appreciating the fact that the assessee has sold shares by a share purchase agreement dated 30.09.2005 and paid the relevant taxes on capital gain. The assessee has cancelled the

share purchase agreement vide cancellation agreement dated 29.04.2013 for the terms & conditions specified therein and both parties mutually agreed to transfer 2,22,222 shares @ Rs.1 per share to the appellant and thus it cannot be said that the appellant has received any property other than immovable property for a consideration which is less than the fair market value of the said property as on the date of transaction. Therefore, he submitted that the additions made by the Assessing Officer u/s 56(2)(vii)(c) of the Act should be deleted.

10. The learned DR, on the other hand, supporting the orders of the authorities below submitted that the reopening of the assessment u/s 147 of the I.T. Act, 1961 is of sound footing which is evident from reasons for reopening of the assessment where the Assessing Officer has formed reasonable belief of escapement of income on the basis of fresh tangible material which is information received from the Assessing Officer of M/s. Bharat Biotech International Ltd where it was noticed that the number of shares held by the appellant in M/s Bharat Biotech International Ltd has increased and on further verification, it was ascertained that the appellant has purchased 2,22,222 shares @ Rs.1 per share whereas the fair market value/book value of the said share was at Rs.124.92 per share. Therefore, the argument taken by the learned Counsel for the assessee on reopening of the assessment is devoid of merit and should be rejected.

11. So far as the addition made u/s 56(2)(vii)(c) of the Act, the law is very clear, where an assessee receives any property other than the immovable property for a consideration which is less than the aggregate fair market value of the property by an amount exceeding Rs.50,000, the aggregate fair market value of such property as exceeded such consideration should be treated as income of the assessee. The reference of share purchase agreement dated 30.09.2005 and subsequent cancellation agreement dated 29.04.2013 does not in any way help the case of the assessee because the said agreement only talks about the first right of refusal of the assessee while buying back the shares, but it does not speak about purchase of shares @ Rs.1 per share. Therefore, the Assessing Officer after considering the relevant facts has rightly made addition and their order should be sustained.

12. We have heard both the parties, perused the material available on record and gone through the orders of the authorities below. The provisions of section 147 of the I.T. Act, 1961 deals with reopening of the assessment and as per the said provisions, if any income chargeable to tax, in the case of an assessee, has escaped assessment in any assessment year, the Assessing Officer may subject to the provisions of section 148 to 153 assess or reassess such income for such A.Y. Before initiating proceedings u/s 147 for re-assessment of any income, escapement of income should be proved and such escapement is based on fresh tangible material come to the possession of the Assessing Officer. In other

words, there should be a live link between formation of belief and escapement of income and such formation of belief should be based on fresh tangible material. In the present case, if we go by the reasons recorded for reopening of the assessment, the Assessing Officer has formed reasonable belief of escapement of income on the basis of financial statement of M/s. Bharat Biotech International Ltd and as per the said information, the Assessing Officer has considered the details of shareholders holding more than 5% equity shares in M/s. Bharat Biotech International Ltd for the year ending 31.3.2013 and for the year ending 31.3.2014 and observed that the assessee Shri Krishna Murthy Ella shares increased from 41,77,560 shares to 45,95,095 shares. The Assessing Officer further noted that the appellant has purchased equity shares from M/s. Mindtree Trading Co. (P) Ltd @ Rs.1/- per share, whereas the fair market value/book value of the equity shares was at Rs.124.92.

13. We have gone through the reasons recorded for reopening of the assessment and also considered the assessment order passed by the Assessing Officer making addition u/s 56(2)(vii)(c) of the Act to the tune of Rs.2,75,37,750 and we find that, the Assessing Officer while recording reasons has stated that the income chargeable to tax has been escaped to the tune of Rs.5,17,40,937/- (Rs.4,17,535 x 123.92 per share), but while completing the assessment has assessed the income u/s 56(2)(vii)(c) of the Act at Rs.2,75,37,750 (2,22,222 x Rs.123.92). From the above, it is undisputedly clear that the Assessing Officer

has issued notice u/s 148 of the I.T. Act, 1961 on the basis of information available in the assessment folder of M/s. Bharat Biotech International Ltd or information received from the Assessing Officer of the said company without any independent verification of the fact to ascertain the fact with regard to the escapement of income, if any. Further, the Assessing Officer has simply issued notice on the ground that income chargeable to tax had escaped the assessment to the tune of Rs.1,57,40,937/- which shows non-application of mind to the relevant facts by the Assessing Officer and simply issued notice on the basis of borrowed satisfaction without any independent application of mind. Further, there is no live nexus between the tangible material and formation of belief of escapement of income which is evident from the reasons recorded by the Assessing Officer and the assessment order passed u/s 147 of the I.T. Act, 1961. In absence of any material on record relating to transaction which had taken place between the assessee and other parties and the Assessing Officer had not made any independent inquiry for arriving at prima facie conclusion that income of the assessee had escaped assessment, in our considered view, reopening of the assessment is invalid and bad in law.

14. The powers of reopening the assessment would only be available with the Assessing Officer as a reason to belief that any income chargeable to tax had been under assessed and that said under assessment had occurred by reasons of either non-disclosure or failure on the part of the assessee to make a return

of his income or to disclose all material facts necessary for his assessment. In the present case, on a perusal of the details filed by the assessee, the Assessing Officer has formed reasonable belief of escapement of income purely on guess work without there being any tangible material which suggests escapement of income. Although the Assessing Officer has finally made addition u/s 56(2)(vii)(c) of the Act towards benefit derived by the appellant for buy back of shares, but in absence of necessary reason to believe that income had been escaped assessment, the reopening of the assessment cannot be sustained. In this regard it is relevant to refer to the decision of the Hon'ble Guwahati High Court in the case of JCIT vs. George Williamsons (Assam) Ltd reported in (2003) 133 Taxman 110. The Hon'ble Supreme Court in the case of PCIT vs. Manzil Dinesh Kumar Shah (2019) 101 Taxman.com 259 (S.C) had considered an identical issue and held that the re-assessment notice issued u/s 148 by the Assessing Officer to verify the validity of information relating to purchase made by the assessee from Hawala Dealers was not justified. A similar view has been taken by the Hon'ble High Court of Bombay in the case of PCIT vs. Shodiman Investments (P) Ltd reported in (2018) 93 Taxmann.com 153, where it has been held that where the Assessing Officer had issued a re-assessment notice on the basis of intimation from DDIT (Inv.) about a particular entity entered into suspicious transactions, this was clearly in breach of settled position of law that reopening notice has to be issued by the Assessing Officer on his own satisfaction and not on borrowed satisfaction. Further, the Hon'ble Delhi High Court in

the case of Pr. CIT vs. Meenakshi Overseas (P) Ltd reported in (2017) 82 Taxmann.com 300 (Delhi) held that where re-assessment was resorted to on the basis of information from DDIT (Inv.) that the assessee had received accommodation entry and there was no independent application of mind by the Assessing Officer to tangible material and formation of reasons to believe that income had escaped assessment, the re-assessment was not justified. The hon Supreme Court in the case of Income Tax Officer vs. Lakhmani Mewal Das reported in (1976) 103 ITR 437 (S.C) held that live link or close nexus which should be there between the material before the Income Tax Officer and the belief which he was to form regarding escapement of income of the assessee from assessment because of the latter's failure or omission to disclose fully and truly all material facts necessary for assessment.

15. In this case on perusal of the facts on record, we find that there is no live link or close nexus between fresh tangible material and formation of belief of escapement by the Assessing Officer which is discernible from the reasons recorded by the Assessing Officer where the Assessing Officer stated that income chargeable to tax had escaped the assessment to the tune of Rs.5,17,40,937/- on account of purchase of 4,17,535 shares, whereas in the assessment order passed u/s 147 of the Act, the Assessing Officer concluded that the assessee has received 2,22,222 shares instead of 4,17,535 shares and finally assessed the income escaped the assessment at Rs.2,75,37,750/-. From

the above, it is undisputedly clear that the Assessing Officer issued re-assessment notice u/s 148 of the act without any independent verification and application of mind, but simply proceeded to initiate proceedings on the basis of information received from Assessing Officer of Bharat Biotech International Ltd which is nothing but a classic case of borrowed satisfaction and thus, in our considered view, the reopening of the assessment based on borrowed satisfaction is invalid and liable to be quashed. Thus, we quash notice u/s 148 of the Act and consequent assessment order passed u/s 143(3) r.w.s. 147 of the I.T. Act, 1961 dated 28.12.2019.

16. The assessee has challenged the addition made by the Assessing Officer towards benefit received on account of purchase of 2,22,222 shares of M/s. Bharat Biotech International Ltd from M/s. Mindtree Trading Co (P) Ltd and argued that said transaction cannot be considered as purchase of shares in light of share purchase agreement dated 30.09.2015 and subsequent cancellation agreement dated 29.04.2013. Although the appellant has made various arguments, but we do not wish to consider the issue on merit because the assessment order passed by the Assessing Officer u/s 143(3) r.w.s. 147 has been held to be invalid on account of incorrect assumption of jurisdiction u/s 147 of the I.T. Act, 1961. Therefore, the grounds of appeal taken by the assessee on merit are dismissed as infructuous.

17. In the result, appeal filed by the assessee is allowed.

SA No.10/Hyd/2024

18. We have already allowed the appeal filed by the assessee in assessee's appeal in ITA No.585/Hyd/2023, and that, the stay application filed by the assessee become infructuous. Thus, we dismiss the stay application filed by the assessee.

19. To sum up, the appeal filed by the assessee is allowed and the S.A filed by the assessee is dismissed.

Order pronounced in the Open Court on 14th August, 2024.

Sd/-

Sd/-

(K. NARASIMHA CHARY) JUDICIAL MEMBER	(MANJUNATHA, G.) ACCOUNTANT MEMBER
---	---

Hyderabad, dated 14th August, 2024.

Vinodan/sps

Copy to:

S.No	Addresses
1	Shri Krishna Murthy Ella C/o P Murali & Co. CAs, 6-3-655/2/3 Somajiguda, Hyderabad 500082
2	Dy.CIT Circle 1(2) Hyderabad
3	Pr. CIT - Hyderabad
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order